IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL S. URBINA,

Appellant,

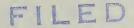
vs.

GEORGIA GILFILEN,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII



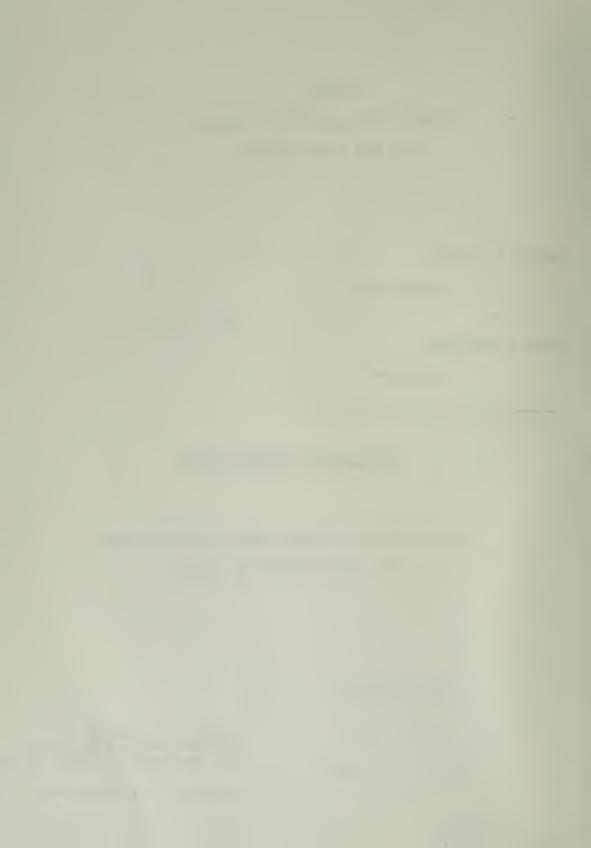
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ARTHUR H. TIBBITS 55 New Montgomery Street San Francisco, Calif. 9410

Attorney for Appellant

ALIC 4007



IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL S. URBINA,

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Appellant,

GEORGIA GILFILEN,

'VS.

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Appellee.

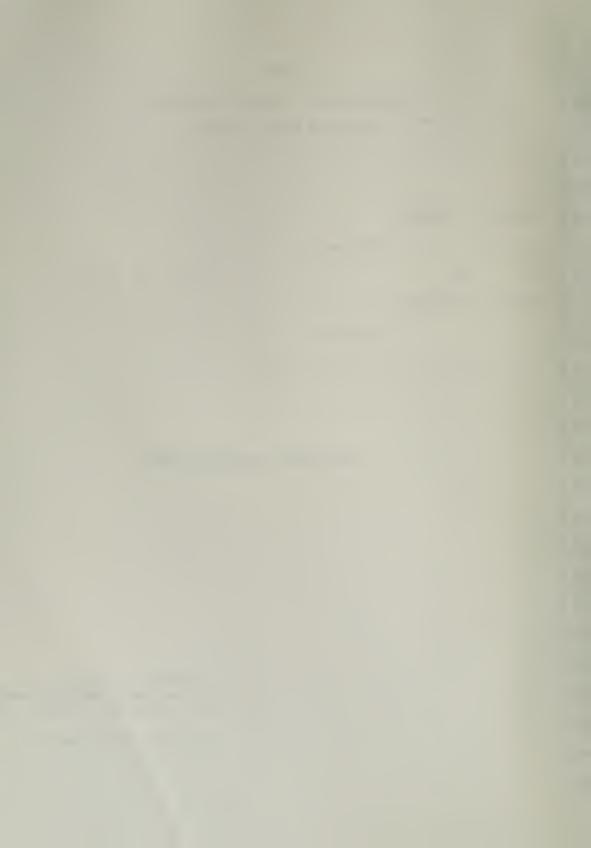
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APPELLANT'S OPENING BRIEF

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55 New Montgomery Street San Francisco, Calif. 941 Attorney for Appellant

ARTHUR H. TIBBITS



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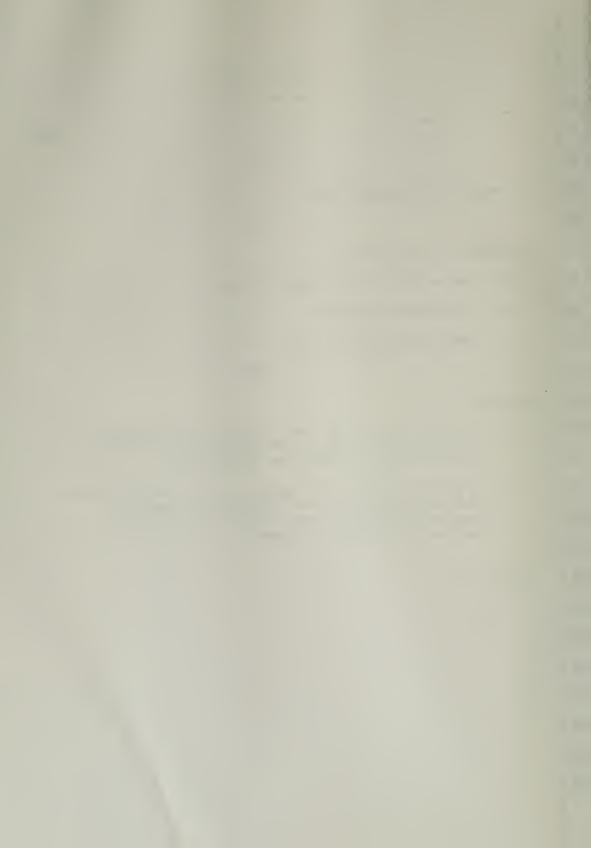


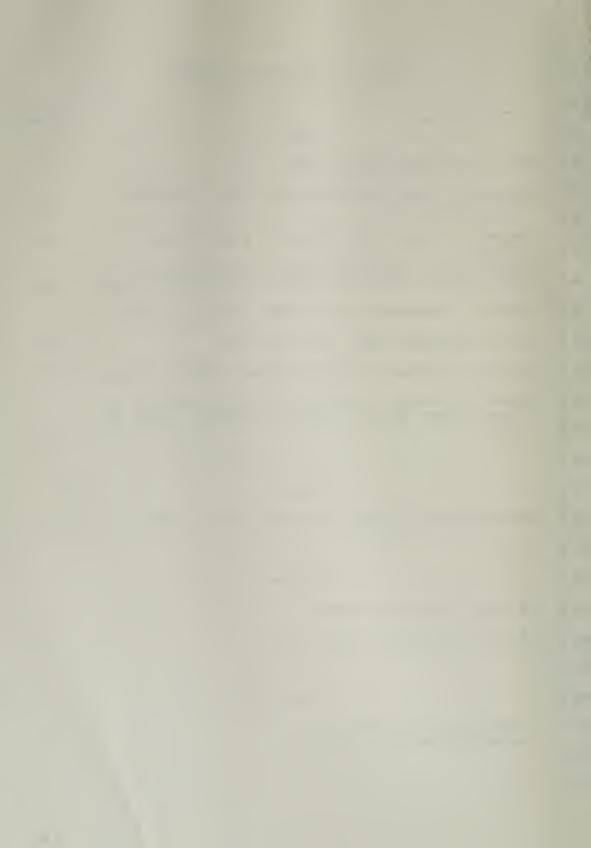
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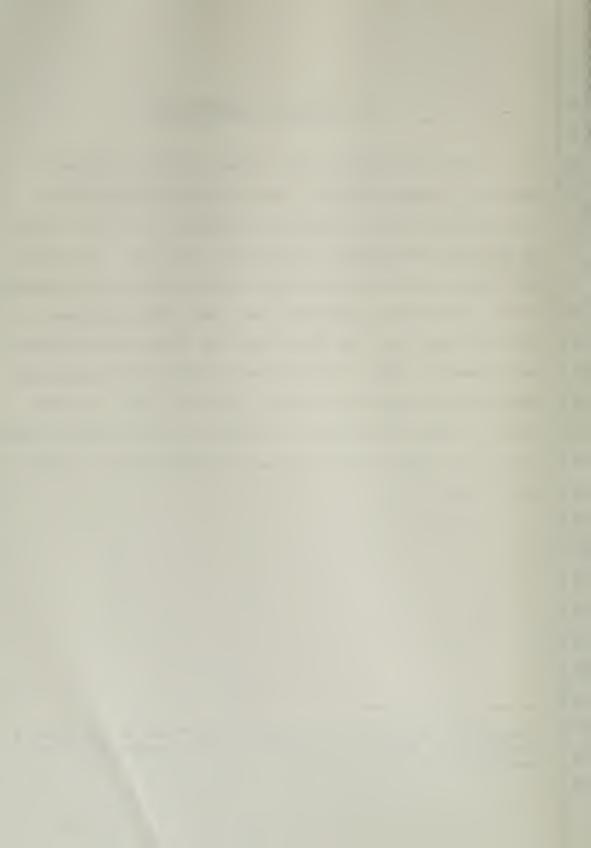


STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of

Appellee, Georgia Gilfilen, rendered by the United States
District Court for the District of Hawaii, in a libel action
by the Appellant against the Appellee. (CTR 55) The action
was commenced in the Hawaii State Court (CTR 11) and transferre
to the United States District Court under the provisions of
28 U.S.C. 1442 (a). No Court Order was entered authorizing
said transfer. (CTR) Jurisdiction of this Court is invoked
under the provisions of 28 U.S.C. 1291 and 1294. A timely
notice of appeal was filed on October 25, 1966, (CTR 58) within
thirty days after entry of judgment on September 26, 1966
(CTR 1 55).

¹Parenthetic references preceded by "CTR" are to the Clerk's Transcript of Record; and by "TR" to the transcript of proceedings in the District Court.



STATEMENT OF THE CASE

A. The Nature of the Controversy.

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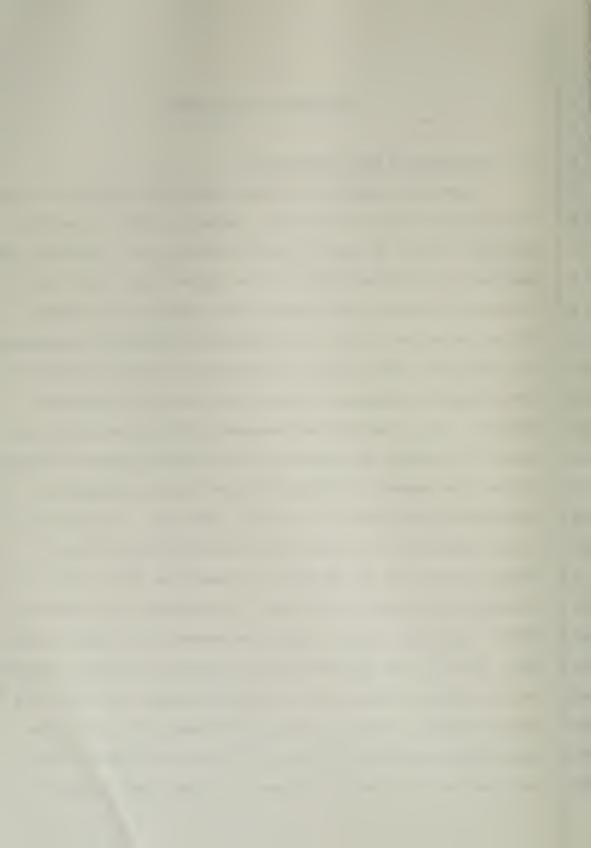
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Appellant, Daniel S. Urbina, filed this action of libel in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 19556, on July 11, 1966, alleging that Appellant and Appellee were both employees of the United States Air Force at Honolulu, Hawaii, and charging the Appellee with having written an untrue, false and defamatory memorandum concerning the Appellant with reckless disregard as to the falsity of the allegations contained therein as a result of which the Appellant was prejudiced and damaged in his career with the Federal Government and profession and suffered general damages in the total amount of \$100,000.00 and special damages as determined after filing of the suit (CTR 11). Upon motion of the Appellee, the action was removed to United States District Court for the District of Hawaii on about August 8, 19 No Order was entered by the Court authorizing this transfer (CTR). Appellant filed a Motion to Remand on or about August 1 1966, (CTR 23) and Appellee filed a Motion to Dismiss Complaint and for Summary Judgment on or about September 12, 1966 (CTR 30 After a hearing on both motions on September 22, 1966, the Court denied Appellant's Motion to Remand and granted Appel-

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lee's Motion for Summary Judgment. Judgment was entered in



favor of Appellee and against Appellant on September 26, 1966 (CTR 55).

Appellant has filed a companion action in the United States Court of Claims No. 113-63 entitled Daniel S. Urbina v. United States based upon the same circumstances as those in the instant case for recovery of damages against the United States Government for the wrongful termination of his employment based upon an alleged false claim for reimbursement of quarters allowance. By decision dated May 12, 1967, the Unite States Court of Claims granted Appellant's Motion for Summary Judgment with the amount of the recovery to be determined in further proceedings. The Court's opinion is set forth in 180 Ct. Cl. ___ and is incorporated by reference as though fully

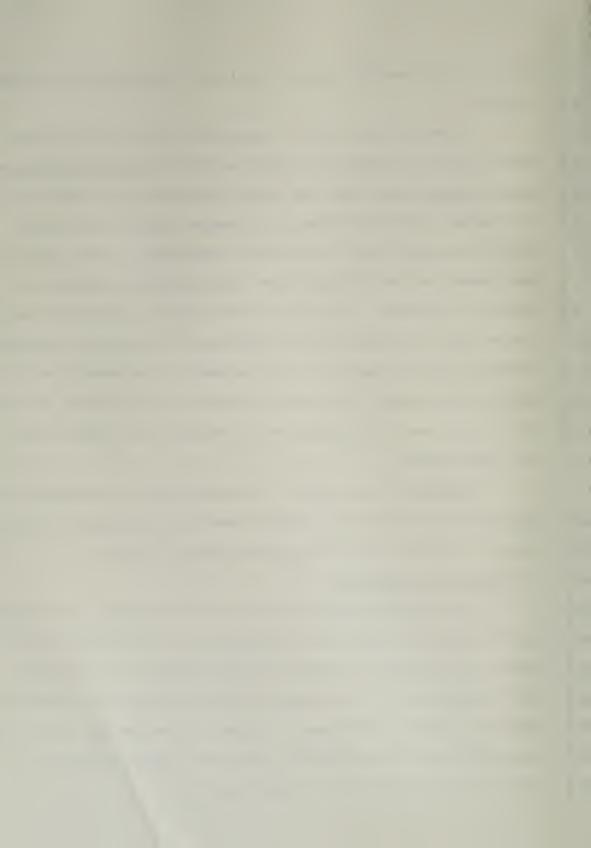
Appellant has appeared throughout these proceedings in pro per until represented in this Court by his present attorned Arthur H. Tibbits, Esq. on or about March 3, 1967.

B. Questions presented:

set forth herein.

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The only questions presented on this appeal are whethe (1) the District Court had jurisdiction of this action in the absence of an Order and Notice to this effect as provided by FRCP 77(d), and (2) the judgment below was properly entered up Appellee's Motion for Summary Judgment where factual issues we presented upon the Appellant's Complaint and the affidavits filed on behalf of Appellant and Appellee.



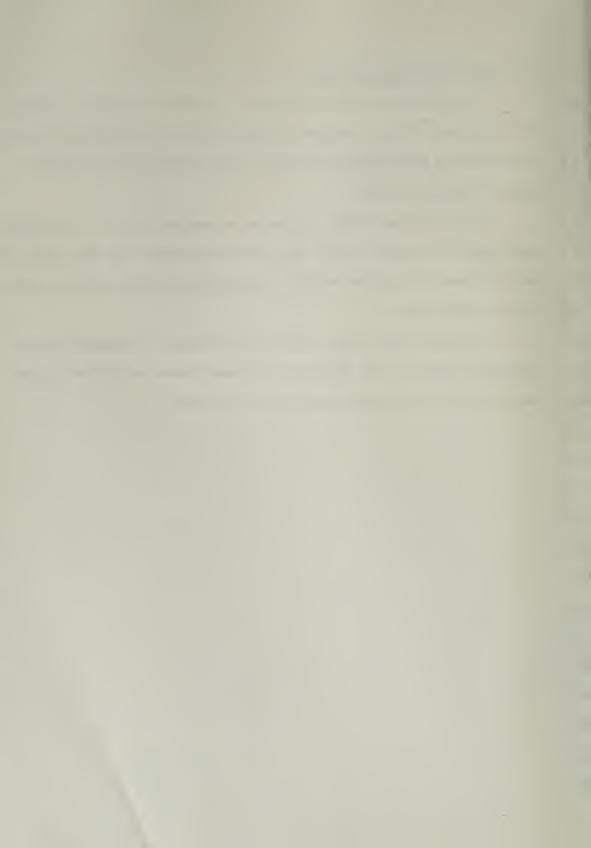
C. Specifications of Error.

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The District Court erred as a matter of law in taking jurisdiction of this action without an order having been entered transferring the action from the State Court to the United States District Court.

The District Court erred as a matter of law in holding that Appellee acted within the outer perimeter of her line of duty in submitting the written memorandum dated July 13, 1961 to her supervisor.

The District Court erred in entering a judgment upon Appellee's Motion for Summary Judgment where a factual issue was raised by the pleadings and affidavits.

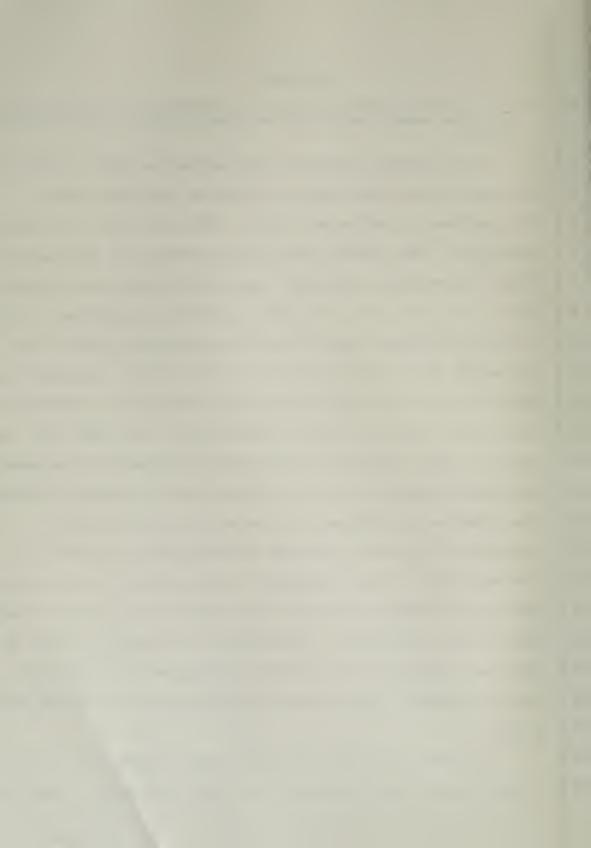


ARGUMENT

A. The District Court was without jurisdiction of this action, no Order having been entered transferring it from the State Court.

The Appellant initiated this action on July 11, 1966 in the Hawaii State Court (Circuit Court of the First Circuit, State of Hawaii, Action No. 9556). (CTR 10 to 13). The Appell on July 26, 1966, filed a Petition for Removal of this action to the United States District Court for the District of Hawaii (CTR 1 to 9, 14 to 15). On July 28, 1966, the Appellee filed a "Motion to Extend Time to Answer or Otherwise Plead to the Complaint" in the District Court. (CTR 16-18). On August 3, 1966, the Appellant filed "Appellant's Objection to Defendant's Petition for Removal" filed herein July 26, 1966 (CTR 19). On August 4, 1966, Appellant further filed "Plaintiff's Response t Defendant's Purported Motion to Extend Time to Answer or Otherwise Plead to the Complaint in Notice of July 28, 1966", objecting to Appellee's "Motion to Extend Time to Answer or Otherwise Plead to the Complaint" on the ground that Appellee's Petition for Removal from the State Court to the District Court had not been acted upon. Nevertheless, on August 8, 1966, an order was entered in the District Court granting Appellee's Motion to Extend Time to Answer or Otherwise Plead to the Complaint.

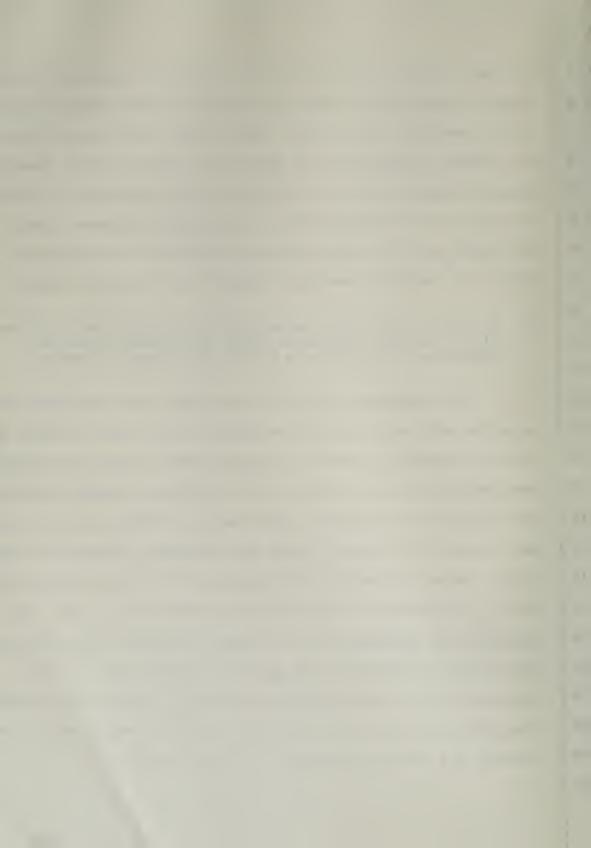
It does not appear, however, that an Order was entered by the District Court granting Appellee's Petition for Removal



or that a notice of said Order was mailed to Appellant by the Clerk of the District Court as required by the Federal Rules of Civil Procedure, Rule 77(d). Accordingly, the District Court was without jurisdiction of this action and its Order granting Summary Judgment for the Appellee entered September 26, 1966 was and is of no legal effect. The Summary Judgment should be set aside and the action should be remanded to the District Court for further proceedings therein on this ground alone.

B. A genuine issue of a material fact existed upon the Complaint and the Affidavits filed in support of and in opposition to Appellee's Motion for Summary Judgment.

Appellee were both civilian employees of the United States Air Force at Honolulu, Hawaii; a dispute arose between the Appellant and Arthur W. Palman, Chief of the Civilian Personnel Division, and Appellee's supervisor, over the sum of \$645.54; the dispute was reflected in certain false and unfounded allegations made by Mr. Palman concerning the Appellant in a letter dated July 3 1961, and Appellant's reply thereto dated July 7, 1961; the Appellee was designated by Mr. Palman to advise and assist the Appellant in preparation of said reply dated July 7, 1961; Appellee wrote a memorandum dated July 13, 1961 to Mr. Palman charging Appellant with untrue and false and defamatory matters knowing the same to be false. As a result of



said memorandum Appellant was damaged in his career with the Federal Service and in his profession (CTR 10 to 13).

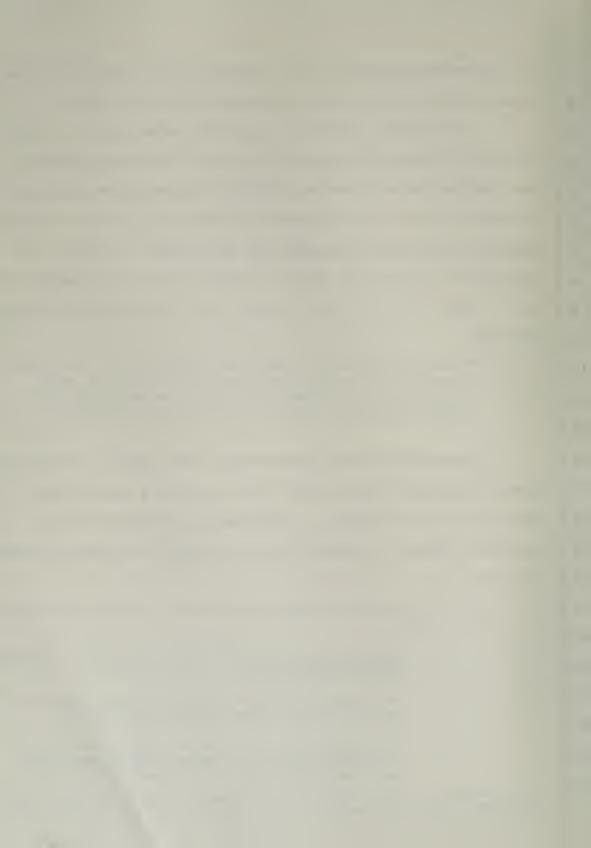
Mr. Palman's letter to Appellant dated July 3, 1961, referred to above was entitled "Notice of Proposed Removal" and charged him with having submitted false claims for reimbursement of quarters allowance pertaining to a house in Tokyo based on his claimed ownership of said house. (Exhibit "C" to Appellee's Motion to Dismiss Complaint and for Summary Judgment) (CTR 43-45). In this letter, Mr. Palman states in part (CTR 44):

"Your written reply should be addressed to the undersigned. Advice and assistance in preparing your reply may be obtained from your Placement and Employee Relations Advisor, Miss Georgia Gilfilen"

Appellee's written memorandum dated July 13, 1961, referred to above, which is the subject of this controversy, reads in part as follows: (Attachment to Exhibit "A" to Appellee's Motion to Dismiss Complaint and for Summary Judgment) (CTR 33).

- "3. It has been established beyond a reasonable doubt that:
 - a. Mr. Urbina owns the house in question, either wholly or in part.
 - b. He submitted false claims for reimbursement of Personally Owned Quarters Allowance.
 - c. He submitted false claims for reimbursement of Private Rental Allowance while occupying self-owned quarters." (Underscoring added)

 $[\]frac{1}{\text{claim}}$ Appellant in fact was not the owner of this house nor did he claim any ownership of it.



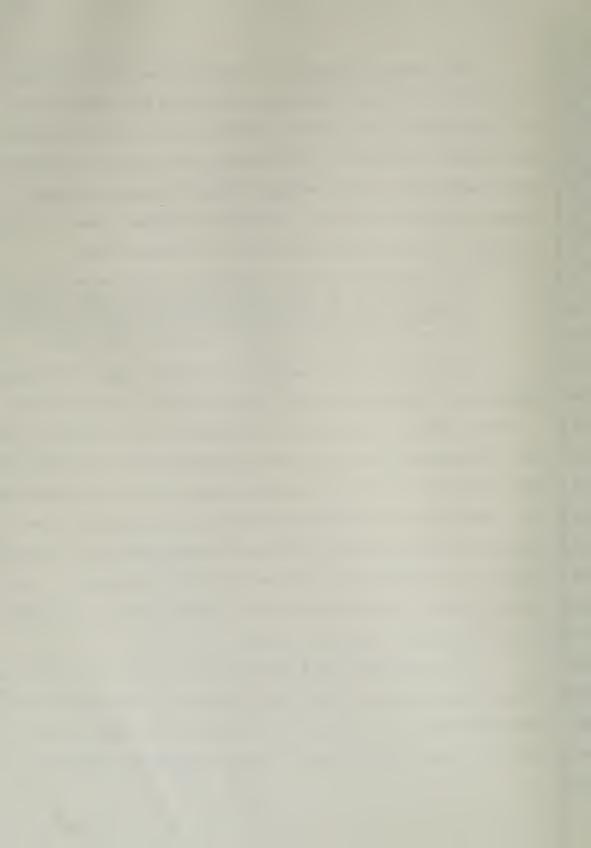
That these statements by the Appellee in her written memorandum of July 13, 1961 were untrue has been established and adjudicated by the Court of Claims in its decision rendered May 12, 1967 in favor of the Appellant and against the United States Government in proceedings entitled <u>Urbina v. United</u>

States, Action No. 113-63. The Court of Claims stated as follow at page 9 of its printed decision, as yet unreported:

"On the central issue involved as to the ownership of the property, it was shown conclusively that neither plaintiff nor his wife then owned the house or land, and that such ownership was in plaintiff's brotherin-law and father-in-law." (Underscoring added)

In her Motion to Dismiss the Complaint and for Summary Judgment the Appellee attached two affidavits, one by Arthur G. Palman and one by herself. Mr. Palman in his affidavit state that the Appellee was at the time of writing the memorandum of July 13, 1961, an employee working under his direction and control, and had prepared the memorandum at his request. The affidavit of the Appellee in essence corroborated Mr. Palman's affidavit in stating that the memorandum in question was prepared by her at the direction of Mr. Palman and in the course of her employment. (CTR 32, 34-35)

The Appellant denied the Appellee's claim that she was acting in the course of the outer perimeter of her duty as an employee of the government in his affidavit attached to his Motion to Remand which reads in part as follows: (CTR 26.)



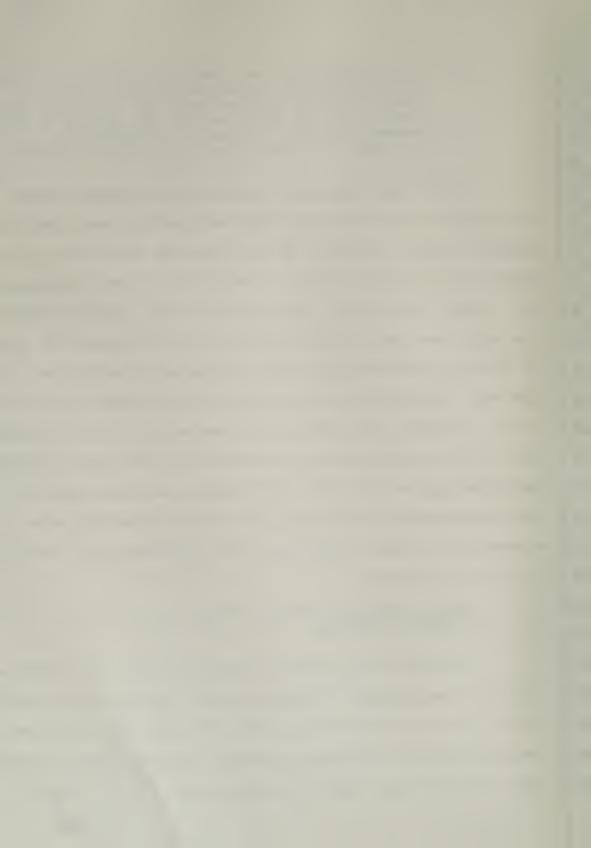
"2. That defendant's negligent or wrongful acts are beyond the outer perimeter of line of duty of federal employees which does not constitute acts under color of office within the meaning of the removal statute as alleged in defendant's petition to remove filed herein July 26, 1966."

It is clear from the foregoing that a genuine issue of fact existed at the time the Court entered its Order granting Summary Judgment, to-wit: Did the Appellee prepare the written memorandum of July 13, 1961 at the request of her supervisor, Mr. Palman? If she did, then under the more recent decisions she would have been acting within the outer perimeter of line of duty and her memorandum would be absolutely privileged. On the other hand, if she had not been so authorized, but had been merely requested and authorized to advise and assist the Appellant in the preparation of his response to the removal action initiated against him, then her written memorandum would be only conditionally privileged, and if malice and the other elements of a libel action were shown, then Appellant would be entitled to recovery.

Barr v. Matteo, 360 U.S. 564 Preble v. Johnson, C.A. 10 1960, 275 F. 2d 275

Appellant respectfully submits that the true extent of Appellee's employment is revealed by Mr. Palman's letter dated July 3, 1961, in which he expressly designated the Appellee, Georgia Gilfilen, to advise and assist the Appellant in preparing a reply to his letter of July 3, 1961 (CTR 44), and by

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Appellee's affidavit dated July 26, 1961 filed in support of her Petition for Removal filed on July 29, 1966, in which she stated that she was designated to assist the Appellant in preparation of such a reply (CTR 5-6). No where in Mr. Palman's

paration of such a reply (CTR 5-6). No where in Mr. Palman's earlier letter of July 3, 1961, or in Appellee's earlier affidavit dated July 26, 1966 was there any indication or mention that the Appellee was designated or authorized to review the charges leveled against the Appellant and to submit a memorandum

in connection therewith. The only basis for such alleged designation or authorization appears in later affidavits of Mr. Palma dated August 31, 1966 and of Appellee dated September 12, 1966 filed in connection with her Motion to Dismiss and for Summary

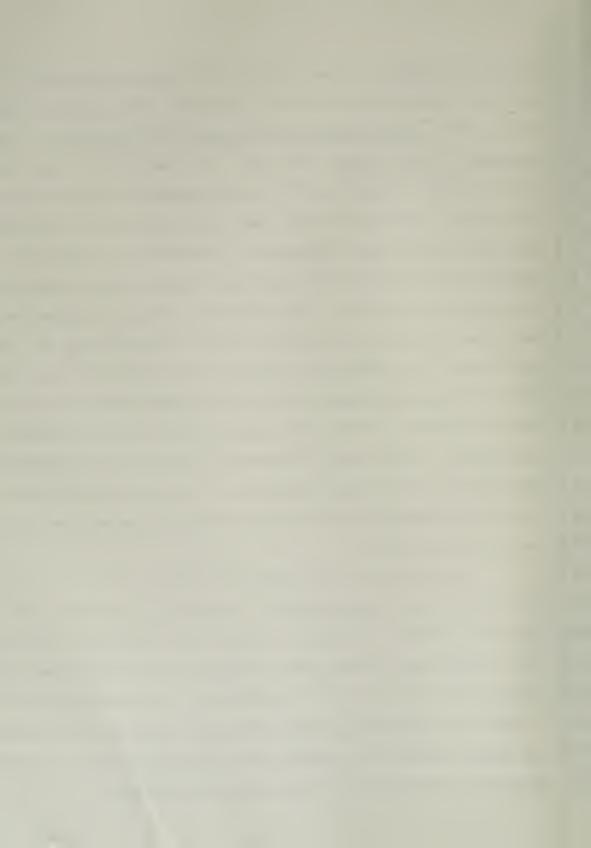
Accordingly, on the basis of Appellee's own supporting affidavit there appears to be a genuine question as to Appellee's authorit to act in connection with the preparation of her written memoran dum of July 13, 1961.

The District Court apparently relied solely on the late

Judgment (CTR 32, 34-35) which appear to be an after thought.

affidavits of the Appellee and Mr. Palman in connection with Appellee's Motion for Summary Judgment and overlooked entirely the inconsistency between these affidavits and the earlier lette of Mr. Palman and the earlier affidavit of the Appellee referred

of Mr. Palman and the earlier affidavit of the Appellee referred to above, in both of which the statements are made that Appellee was merely designated to assist the Appellant and not to write a memorandum substantiating the charges against him. (TR 21-29)



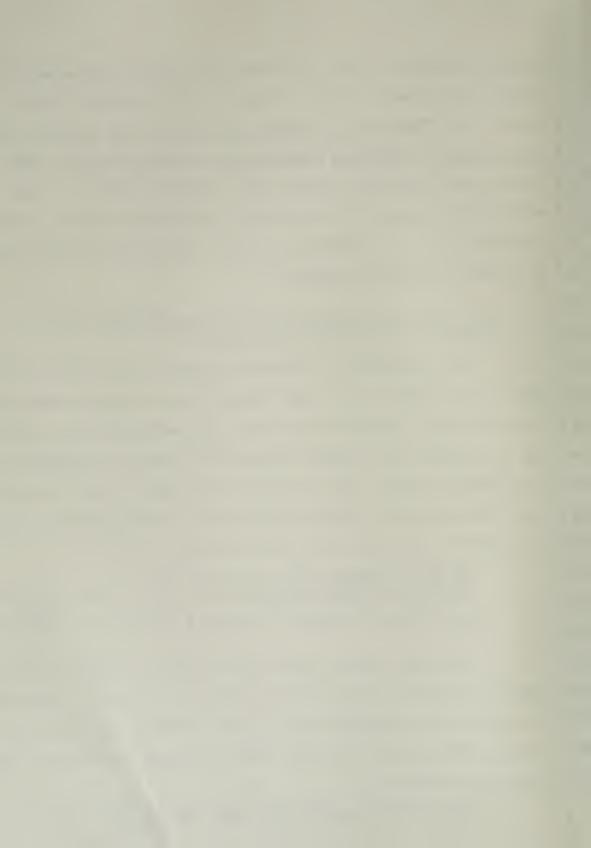
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strates that Appellee's authority was confined to advising em-
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    ployees not to reviewing administrative charges against them.
    In any event Appellant submits this apparent conflict in the
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    affidavits in support of her Motion for Summary Judgment raises
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    an issue as to the credibility of said affidavits which may not
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    be decided by summary judgment.
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    C. Where there is a genuine issue of material fact, it is
        improper to enter a Summary Judgment.
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             The function of a Summary Judgment is to avoid a useles
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    trial; and a trial is not only useless but absolutely necessary
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    where there is a genuine issue as to any material fact. In rul-
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    ing on a Motion for Summary Judgment, the Court's function is
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    to determine whether such a genuine issue exists, not to resolve
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    any existing factual issues; and to deny Summary Judgment where
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    is a genuine issue as to any material fact.
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             <u>U. S. v. Diebold, Inc.</u>, 369 U.S. 654
18
             Brawner v. Pearl Assurance Co., C.A. 9 (1958) 267 F 2d
19
             See 6 Moore's Federal Practice § 56.15 at ps. 2281, et
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             The Ninth Circuit has insisted that a judgment cannot
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    validly be based upon the summary trial by affidavits, and that
    the parties are entitled to have issues of fact tried at trial
23
    through introduction of exhibits and witnesses produced for dire
24
25
    and cross examination.
             Lane Bryant v. Maternity Lane Ltd. of Calif., C.A. 9
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1949, 173 F. 2d 559,565, 173 F 2d 559,565

Finally, Appellee's title "Placement and Employee Relations Ad-

visor" (see Palman's letter of July 3, 1961) (CTR 44) demon-

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Finally a plaintiff is not entitled to summary judgment where his credibility and that of his supporting affiants is in issue.

Kasper v. Baron CA 8 1951, 191 F 2d 737, 738

CONCLUSION

It is respectfully submitted, for each of the reasons hereinabove set forth, that the judgment entered in favor of Appellee and against Appellant be reversed and the action remanded for further proceedings in the District Court.

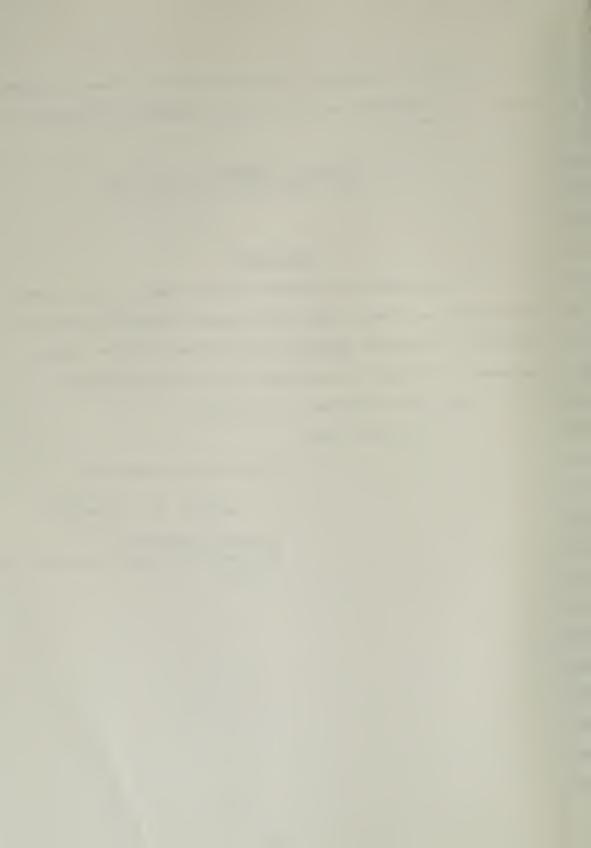
Dated, San Francisco, California,

July 30, 1967

Respectfully submitted,

asters A. Jakoto

Arthur H. Tibbits, Attorney for Appellant Daniel S. Urbina

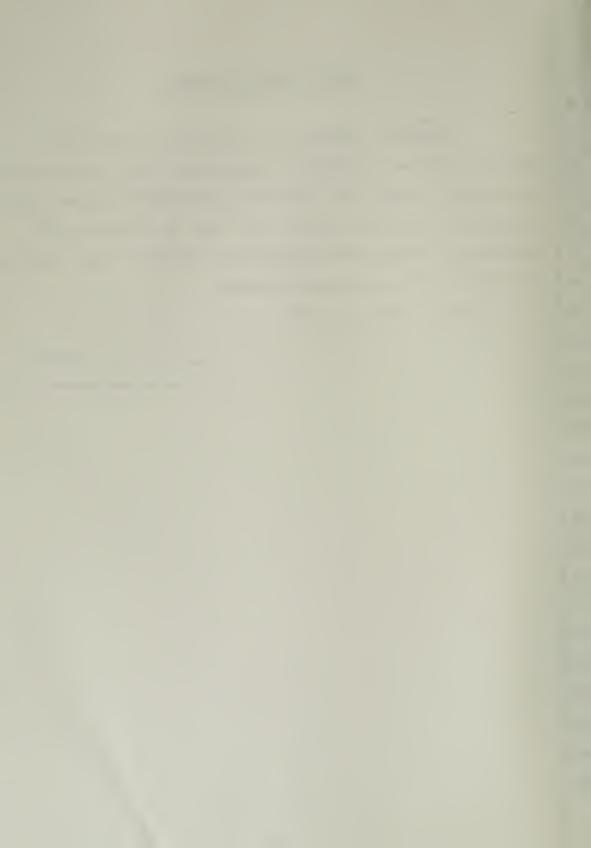


CERTIFICATE OF COUNSEL

I, ARTHUR H. TIBBITS, the attorney for Appellant
Daniel S. Urbina, do hereby certify that I have examined the
provisions of Rules 18, 19 and 39 of the United States Court of
Appeals for the Ninth Circuit, and that in my opinion the
Appellant's Opening Brief tendered on behalf of said Appellant
conforms to all requirements thereof.

Dated: July 30, 1967

Coston No Island.



PROOF OF SERVICE

ARTHUR H. TIBEITS, ESQUIRE, certifies that he is an
active member of the State Bar of California and that his
business address is 55 New Montgomery Street, San Francisco,
California 94105, that he has served a copy of the attached
Opening Brief of Appellant DANIEL S. URBINA by placing a copy
in an envelope addressed to the following person at his office
address:

Herman T. F. Lum
United States Attorney
District of Hawaii
United States Department of Justice
Honolulu, Hawaii

Attention: Yoshimi Hayashi Assistant U.S. Attorney

The envelope was then sealed and postage fully prepaid and on August 1, 1967, was deposited in the United States mail at San Francisco, California.

Executed on August 1, 1967 at San Francisco, California.



